Barnard (H.)

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A LECTURE

DELIVERED BEFORE THE

New York Medico-Legal Society,

—BY—

HORACE BARNARD,

FEBRUARY 26, 1874.

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EXPERTS AS WITNESSES.

By HORACE BARNARD.

DR. REID, in his "Inquiry into the Human Mind," uses these words: "The wise and beneficent Author of nature, who intended that we should be social creatures, and that we should receive the greatest and most important part of our knowledge by the information of others, hath for these purposes implanted in our natures two principles that tally with each other. The first of these is a propensity to speak the truth, and to use the signs of language so as to convey our real sentiments." In this the learned Doctor is unfortunately at direct issue with another equally renowned philosopher, at least so far as regards the use of language. Possibly, from a realization of the existence of other ideas on this subject, which have also received expression in the teachings of the Church of Calvin, the Doctor is not slow to qualify his flattering estimate by somewhat humiliating confessions. It is natural to speak the truth, and it is unnatural to lie, but it is a result of the ease of the one and the difficulty of the other. Speaking truth is as agreeable as taking our daily food, but falsehood is as nauseous as taking physic. Now, pleasant as it is to consider our nature as being what the Doctor describes it to have been in the beginning, human experience has more than verified his apprehension that "there may be, indeed, temptations to falsehood which would be too strong for the natural principle of veracity, unaided by principles of honor and virtue." How to afford it that aid, so that men could indulge in safety their other natural propensity to credulity, has been a source of anxious study to men of all ages of which we have any record. It would not be possible, if proper, to even sketch these various efforts, which, one and all, recognize man's fearful declension from that state of moral elevation and equilibrium so happily described in the inquiry. It will be quite sufficient for our present purpose to devote a little space to that method which we have received from our ancestors, and which it is our duty to hand down unimpaired, if not improved, to our children.

This method of evoking from witnesses, upon a question of disputed fact, such truthful utterances as to warrant reliance, is such as, we may well conceive, would recommend itself to a brave, liberty loving race. It is to compel them to testify openly and publicly, and under the sanction of oath, in such manner that their utterances can be sifted by those interested to ascertain the truth of their statements. Nothing being admitted but what could be openly avowed and shown, the trial *per pais*, or

by the jury, taken from the people and sworn to impartiality, naturally recommended itself to all the northern nations as the fairest as well as the best mode. It certainly calls into exercise those sentiments of honor and virtue, or courage, which we have seen are needed to protect our principle of veracity from the temptations to falsehood. Coupled with the comparatively modern privilege of representation by counsel learned in the law, and the wide range and power given to cross-examination, there would seem to be but slender chances of its failing to attain its object. Where it has failed, the cause of the failure will be found in the moral condition of the community from which the jury is drawn. Of this they are the true representatives, now as formerly, neither rising above it nor falling below. If, therefore, we find that certain acts, of the commission of which there can scarce be doubt, are lightly treated if not wholly condoned by the verdicts of our modern juries, we should apply our censure to the source of the evil in the lax moral tone of the community, or find an excuse in the manner in which the testimony had been presented. Regarded originally as the safeguard of the subject or citizen from the oppression of power, the jury is unfortunately itself subject, only too much, to the control of popular opinion. Against this danger, in turn, devices have been adopted (and an oath is administered), to the end not only that the truth of the statements made to the jury may be tested and determined, but that they shall true verdicts give according to the *evidence*. Hence the duty of the Judge presiding at the trial to exclude from their consideration, in former days, the testimony of interested parties, that they might not only be required to pass upon the utterances of impartial witnesses; and, now that this barrier against temptations to falsehood has been swept away, the existing duty of excluding from their consideration statements made on hearsay, and everything which cannot be reduced to statements of fact on positive knowledge. Of the manner in which this judicial duty should be performed, what should be admitted, and what excluded, and of the little effect which the neglect of it should produce on the minds of an ideal jury, I cannot better explain than by the following extracts from "Phillips' Golden Rules" for their guidance:

"An honest juryman should suffer death rather than consent to any decision which he feels to be doubtful or unjust, or which, in his own private judgment, is not warranted by clear and uncontrovertible evidence.

"Every juryman should be *jealous* that no other *opinion* than his own directs the decision; for his office would be a mockery on himself, on the parties and on his country, if his decision were not the result of his own unbiassed convictions. The juryman who, ignorant of his duties, is inattentive to the progress of a trial, and decides on the suggestions of others, betrays his sacred duty, and is himself unworthy of the privileges of the law and of the protection of justice.

"In deliberating on the verdict every juryman is bound to think for himself, to give his individual opinion freely and boldly, and to bear in mind that it is the sole and entire object of the institution of juries, that every juryman for himself should decide according to his own judgment on the points at issue."

Having thus laid down these cardinal rules for the guidance of the jury in forming their verdicts, he exhorts them to guard against popular prejudice, the insidious sophistry and daring artifices of counsel, and against undue influence in whatever quarter it may arise; and to decide only on an abstract and cool consideration of the proved facts and the positive evidence of credible witnesses.

When one reads rules for conduct like these, a vision of the Golden Age arises. If the jury, who are to be taken from the mass and fairly represent the people, are capable of appreciating the nobility of their duty, and have the courage and ability to perform it, there would seem to be no need of the Judge to protect them from the insidious sophistry and daring artifices of counsel, or undue influence whatsoever. The people among whom such juries are common, scarce need their assistance. Unfortunately, however, the moral tone of mankind has not yet risen so high as to render obsolete the ninth commandment of the Decalogue, or to destroy the necessity of insisting upon the well considered rules of evidence. The insidious sophistry and daring artifices of counsel have not wholly failed of a market. Increasing wealth has brought in its turn increased luxury, with its attendant passion for display, and the need of great and greater means for its gratification, with less and lesser power of resisting temptation. The ordinary struggle of life has grown to be a competition so keen as to present the only alternatives of success or destruction. What wonder is it, then, if we find the Courts invaded by the parties to this struggle, and the attempt, too often successful, made to bend their time-honored rules to the advancement of selfish interest?

I have described the tribunal, in the words of Phillips, such as it ought to be, but when I add that it is of and represents the people, subject to like passions and sharing in their shortcomings, it will be apparent that a great privilege is accorded to that witness, who is to such a degree absolved from the ordinary requirements of law as to be permitted to offer it his opinions with authority. This is the exceptional power of the expert, and it is mainly in his character as a witness before a jury that I propose to consider him. Were he an exceptional man the inquiry might be unnecessary, but he certainly is not.

It is evident that in a case in which the nature of an invention, science, or other mystery is involved, the mere narration of the technical terms thereof would be of small aid to an ordinary jury in forming their verdict, and it is equally plain that any explanation or translation thereof would be perfectly right and

proper. This, from the necessity of the case, is the proper province of the man of superior skill or experience therein, or—as we term him—of the expert. From this simple duty, and the correlative power of informing the jury of the proper nature and relation of facts otherwise proved to them, has been derived the custom of admitting his opinions in defiance of the ordinary rule.

It would seem from our experience that it is not in social differences only that explanations are dangerous. The recurrence to the "hypothetical case" as a means of restraining the expert from assuming *directly* all the powers both of judge and jury is an after thought, is a weak invention, which has, if it has done nothing else, stimulated the inventive powers of counsel. Between the testimony of experts and the sophistry of advocates the results which one might expect from the observance of the Golden Rules of Phillips have hardly been reached. Too often have verdicts been but the record of the interested opinions of experts, shocking the sentiment of the community from which they have been drawn.

The frequent recurrence of such results, following the admission of expert opinions as testimony, would seem to point to the propriety of either remodelling our system of trying disputed questions of scientific fact, or the exclusion of expert opinions from the jury. The advocates of this latter measure, daily growing more numerous, are met by the assertion that there is a necessity for their admission—that otherwise there would often be a total failure of proof. Without adopting either side, or admitting that opinions can be called proof in any sense, let us inquire a little into this excuse for their admission.

As it will not be contended that merely theoretical opinions should be admitted, we have only to deal with those which are founded on fact (and medical books being excluded as evidence, in that direction at least)—on facts ascertained by personal observation and study. When, therefore, under the present system an opinion is admitted, it is either preceded by proof of qualification as expert, or tested to that extent by cross-examination, by either of which the facts are brought out on which it is founded. The opinion is reduced, therefore, by analysis to a result of an exertion of the memory, comparison, and reasoning powers of the expert witness. In regard to this, the highest court in our State (in Newell *vs.* Doty, 33 N. Y., 94) has decided that a question calling for such an exertion is not allowable. Apart, however, from the "authority" cited, why could not the witness have testified to these facts? If the witness was confined to a simple narration of his knowledge, the counsel qualified to ask the question could, doubtless, as well exert his reasoning powers in a fair, open argument, the soundness of which could be maintained or overthrown by his opponent. Surely, therefore, in the interest of fairness, it will not be contended that the witnesses should be allowed to argue the case by way

of testimony under plea of necessity, and an argument on facts is all that a well founded opinion amounts to.

In the case of Carter *vs.* Bohn the suit had been brought to recover certain insurances on a trading fort in the East Indies, and was defended on the ground of concealment of material facts from the insurers, contained in two letters of the assured. On this point—of the effect which those letters would have produced—the defence offered the testimony of the broker as an expert, "that in his opinion those letters ought to have been shown or the contents disclosed, and if they had been the policy would not have been underwritten." On this Lord Mansfield says: "Great stress was laid upon the opinion of the broker, but we all think the jury ought not to pay the least regard to it. It is mere opinion—which is not evidence. It is an opinion after an event. It is opinion without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the Court and jury were to determine the cause, and therefore it is improper and irrelevant in the mouth of a witness."

This case was one relating to insurance law, which, as it involves in the formation of the bargain for insurance the calculation and estimation of future risks, would seem to afford proper ground for the operation of expert opinions. We have, nevertheless, seen it excluded by such a leader in the law that no man may hesitate to follow in his footsteps. That it is still admitted is true, but that there is any necessity therefor I am bound to deny. Let us look at a few instances without discussion:

1. An expert machinist can opine that a machine is not made in a workmanlike manner (Curtis *vs.* Guno, 26 N. Y., 246); that the principle of two machines is the same (Barrett *vs.* Hall, 1 Mass., 470). Manner of building a bridge (16 N. Y., 158).

2. A medical man may give his opinion as to the permanency of injuries (Buell *vs.* N. Y. C. R. R., 31 N. Y., 314).

3. Attesting witnesses as to testator's mental condition at the time of the execution of his will (Delafield *vs.* Parish, 25 N. Y., 9–97).

The opinions of the medical experts—not under oath in this case—were regarded by the *Court* as "valuable disquisitions," instructive to the Court, but not evidence. That they are precluded from forming their decision, by law, from anything but facts sworn to in a legal manner. Judge Selden, however, in his dissenting opinion, holds that "when a physician, from personal observation or an authentic description of the symptoms of a case, has arrived," etc., his opinion is received in evidence. As far as the opinions bear upon the medical symptoms of the case, they are to be regarded as the opinions of experts; but as far as they rest upon testimony as to mere want of intellect, they are no better than the opinions of ordinary witnesses.

4. A medical man conversant with the disease of insanity, having had prior observation of the habits, conduct and appearance of the prisoner, may give his opinion as to the sanity or insanity of the prisoner (People *vs.* Lake, 12 N. Y., 363); though it is doubted, on principle, whether he can after only hearing the testimony; he may be asked, under cover of the hypothetical case, the same question in the main—he certainly cannot on a part of the testimony (see post, Sanchez *vs.* People, 22 N. Y. 154).

Omitting the thousand others, these are enough to show that the expression of the opinion can be obviated by narrating experience, and that the real reason for their admission at all is the supposition that labor is saved thereby. If, therefore, we cannot find a sufficient basis for the plea of necessity in introducing well founded opinions, it is not likely that we will find sufficiently good grounds in the *relief* which it brings to the Court as a seat of judgment. As now introduced the experts who give opinions are produced by one side or the other, and the jury, who listen to the final charge, cannot help perceiving that it is often dictated by the witnesses. Such cases so decided are not, and ought not to be satisfactory. In one shape or another they rise until they reach their final rest in the Court of last resort, or the utter exhaustion of the suitors.

In that class of causes which relate to inventions, the duties of the expert are so clearly defined in the theory, at least, of the law, that they would seem to be, at last, in their proper position as aids to the Court in instructing the jury. It is the province of the Court, in patent causes, to determine what is intended to be patented, the certainty of the specification, so as to entitle the invention described to patent, and, in short, to decide what the patent is for and whether it is valid. The Court is to instruct the jury as to the meaning of the specification and the legal construction of the patent; but when there are terms of art in either which need explanation, or other surrounding circumstances which affect the meaning of the specification, these form a qualification in the instruction which calls for the assistance of experts. They are, from their experience, to explain the terms of art and surrounding circumstances. The statutes require that a specification should so describe an invention that those skilled in the art, etc., may be able to use the same. Consequently, experts may, very properly, explain these terms, and show whether the invention is practically useful. Of course, if the Court possessed the requisite skill, this aid would be both unnecessary and improper; but until that hope of inventors—a proper tribunal for the trial of patent causes—is organized, we must be content with what we have.

From this short sketch of the duties of the Court and the experts, one would scarcely expect that there could be more than one *opinion* in a patent cause—that of the Judge, given to the

jury. Let us glance at the facts. Inventors are numerous, courts few and time precious; hence, a class of men has arisen who have become professional experts in patent suits, and who command a rate of compensation which may well excite the *envy* of less fortunate men. It may be, therefore, only envy which inspires the suspicion that the nature and manner of their employment—not to mention the pay—tend to warp their judgment. Whatever the reason, the fact is well known that there is scarce a patent cause brought into court which is not prosecuted and defended by means of expert opinions on both sides. I cannot better illustrate this curious fact than by repeating, as nearly as possible, the words uttered by one of our most distinguished advocates in open court. Referring to the immense heap of expert testimony introduced into the cause, and then piled up before his antagonist, he said, "That he would not have the slightest difficulty in furnishing an amount equal in bulk and quality which should contradict it flatly. I know," said he, "two brothers, experts by profession, of high reputation and acknowledged skill, one of whom I have examined on the direct and the other on the cross-examination, in the same suit on the same matter, and in relation to the same state of facts, and I have received from them diametrically opposite opinions thereon." The gentleman whom I have quoted is a man of great ability but also of equal charity. Doubtless, therefore, he would join his professional brothers in the regret that the laws of mechanics, and what are called the exact sciences, are so unsettled as to produce such diverse opinions.

These opinions, such as they are, are submitted under a very wide construction of the statutes already referred to. They are given under oath, and being ordinarily taken in form of depositions, are subject to the close scrutiny of prolonged cross-examination. If sound, this develops the facts on which they are founded, and, at the same time, would seem to take away all reason for their admission—since, as has been stated, the Court is bound to pass only on facts, and the formation of the effective ruling opinion is the province of the Judge and jury. The allowance of them on one side begets a necessity for the production of counter opinions on the other; and the manner in which this is at present conducted inflicts a wrong upon the public. Few inventors are rich enough to afford one of these expensive contests. Either, therefore, their inventions are abandoned, or they pass for a trifle into the hands of some powerful combination, which is thereby enabled to inflict all the mischiefs of a monopoly upon the people.

This cursory glance at the confusion which often arises in suits involving the application of mere mechanical principles, from the contradictory testimony of costly experts as witnesses, is enough to satisfy a reflecting mind of the danger which attends their unrestrained use in cases less capable of exact demonstration. If great wrong and injustice can be done in matters capable of ma-

terial proof, what may not happen in cases involving the mysteries of sciences not yet fully explored, and which are professed by different and conflicting schools? The testimony of the former class, *known* to have been paid for by the party producing it, may be weakened, if not destroyed, by making manifest its partisan and disingenuous character; but how will we meet the testimony of experts belonging to an honorable profession, and deserving, by their private virtues, of the respect of all? It is not to be supposed that such men, under the restraining influence of their own honorable character, and especially when under oath, will deliver opinions in which their own faith can be shaken—and it is not for the purpose of restraining such experts from the utterance of intentional falsehood that the strictest rules of evidence should be invoked; but when we recall the lessons of experience, and bear in mind the diversity of opinion which has always existed, the conflicts of the schools, the proverbial disagreement of doctors, and the imperfect and unsettled condition of the science of medicine itself, does it not seem a little hazardous to admit (see People *vs.* Lake, *supra*) the opinion of a medical expert as testimony in cases involving life and death? Did our system admit of the rendering of Scotch verdicts of "not proven," one objection to their admission might be removed by the instruction of the Judge to the jury to limit their verdicts in that manner, where their decision depended, in any degree, on the opinions of experts. But with the necessity of deciding positively one way or the other, it would seem much better to cling to the well established rule of requiring facts, and to reject every opinion which cross-examination could or could not reduce to a concise narration of experience. It is certainly the safer rule, and more accordant to the spirit of our institutions.

The principle of our criminal law that the prisoner should have the benefit of the doubt, and that it is better for the community, in sustaining their respect for law, that ten guilty persons should escape rather than that one innocent person should be punished, would seem to demand the exclusion of all testimony which, like opinions—even of experts—failed in the element of certainty. With us the fate of the accused is to be decided by the testimony of credible witnesses to positive facts—and it is for the jury alone to form an opinion from them when so proven, and yet the books are full of cases in which this testimony has been allowed.

In that of the People *vs.* Lake, physicians, as experts in insanity, were in the first instance allowed to give their opinion on the sanity of the prisoner after only a partial hearing of the testimony, and the accused was convicted and sentenced. Reversed as this sentence was by the Court of Appeals, although the Court doubted whether medical witnesses ever should be allowed to give a general opinion on the insanity of a prisoner, it yet holds that such opinions may be evidence when the ex-

pert has had opportunity for observation, and is conversant with the disease.

In the case of the People *vs.* Montgomery, tried first in 1870, the accused was convicted and sentenced for the murder of his wife, mainly, if we may judge from the report, on the testimony of physicians that he was sane at the time. "The question at issue on the trial (says the Court) was chiefly a medical one, in respect to which the opinions of medical men would be likely to exert a great if not controlling influence." In examining this case for the purposes of this paper, at the suggestion of Mr. R. S. Guernsey, I discover such a wealth of illustration that I am tempted to make larger extracts. While differing from him as to the right of a juryman to have a private opinion, for reasons given in the Golden Rules cited, I cannot but pay the highest compliment to Mr. Guernsey for the learning and research shown in his note appended, and which forms a portion of an article which I have not had the good fortune of reading.

It is true that the admission of these opinions is subject to the after charge of the presiding Judge; but even where, as in Cole's case, the jury are told by such a Judge as the late Judge Hogeboom that they must estimate their value—that they are the ultimate judges on this point, or they are as fully discussed as in Montgomery's case—the jury are not always able to emancipate themselves from the thraldom which the supposed superior wisdom of the expert imposes. And this again furnishes a serious objection to the admission of the expert as a witness, apart from all interested motives; and if the sciences professed were reduced to the perfection of certainty, instead of being for the most part imperfect, he would still be objectionable as a witness; but with the present state of uncertainty in medical, chemical and related sciences, the very reputation of the man intensifies the objection. The jury are not competent to criticise him, and the higher his position the more they will be influenced by his opinion. If, therefore, the school in which he has obtained his instruction and subsequent success should happen to be incorrect in its tenets, and he clings thereto, as we know he will, what danger do we not incur when we permit him to leave the narration of the facts of observations and utter the opinions of his sect! How shall we disabuse the jury, and confine them to their duty, unless by calling in another expert, equally learned, of the opposing school, and by their conflict seek to determine the law and the facts? See Montgomery's case.

Fortunately for courts and community such conflicts are rare, and even when they do occur the juries recollect that they too have a right to an opinion. They may listen patiently to learned disquisitions which they do not comprehend, but often their verdict proves that the effort has been labor lost. Need I do more than refer to that somewhat recent death by a pistol shot, which called forth such able essays on the deadly

effect of soporifics and the lethal consequences of shock. While reading the record, one is tempted to believe that the jury alone remembered that there was a shot wound in the bowels. In the early days of the West there were model juries, who decided that every man found with a round hole through his head had died by drop fever, or visitation of God, but when a bullet was found in the head gave it the credit of the death.

The case to which allusion has been made would seem to have been one in which the scientific testimony would have taken the simplest shape, and that beyond the evidence of the surgeons none other could have been admitted; yet, under the relaxation of the rules of evidence, we have seen how great a cloud of witnesses were allowed to ventilate their theories in its connection. The result, if it has manifested anything, has shown the wisdom of greater strictness of their exclusion, if only for the sake of economy.

In cases of death by poisoning there is an apparent necessity for scientific testimony. Let us see if they afford any better reason for the relaxation of the rules of evidence. Suppose, then, that all the preliminary investigations by chemists and surgeons are completed and the case on trial—what ought to be the testimony of the expert called? Certainly nothing more than the description of the processes employed, a positive averment of the chemical result, and possibly an assertion of the absence of other causes of death. But here he should stop. By what right should either chemist or surgeon say that, in his opinion, the poison found was the cause of death? If an undoubtedly deadly poison be found in sufficient quantities to produce death, doubtless he can say just that fact—this will be enough to enable the jury to do their duty—and here his office ends. Allow him to say more, even in a case free from doubt, and a precedent will be formed for use in cases where the facts are not so clear. Remember that assertion may be shaken on cross-examination, but opinion, even when producing conviction, gives no good hold.

To show how carefully even such testimony as is based on scientific experiment, the result of which rises from opinion to the evidence of a fact demonstrated, should be criticised before admission, let us refer to one or two recent cases:

In the first—that of Dr. Schoeppe—there was every apparent reason for charging him with the crime for which he was brought to bar, and yet, as the result has proved, there was the greatest necessity for even something more than the strict application of the rules of evidence to secure him a fair trial. Of foreign birth and manner, he labored under the weight of popular dislike and prejudice. His engagement to marry Miss Steinecke, a woman so much older than himself, the consequent will in his favor, his constant attendance upon her, furnished the apparent motive and opportunity for the

commission of the crime. Her sudden death completed the chain of suspicious circumstances. It is evident that the facts in the case had already made their impression upon Dr. Aiken, the expert called by the State, before he began his investigation, and that he had already formed his opinion before he had ascertained the facts. His own convictions blinded him to the truth that his duty compelled an exhaustive search for facts, and not for the means of supporting his own opinions. The circumstances already mentioned lead us to take the most charitable view of his actions, and to give him credit for an invincible conviction of the guilt of the accused; nothing less than this will excuse his manner of performing his scientific duties, as subsequently shown. Were it possible in this paper to comment at large on all the processes employed by him to produce the result attained, it is not to be doubted but that it could be shown that at each step he took something for granted—that every one of his experiments was founded on a false assumption, and the result a mere expression of opinion. Fortunately it is not necessary. We all know the effect produced by his *ex parte* testimony on the jury, and to whom belongs the credit of saving the victim of this "opinion" and public prejudice from the gallows. Had Dr. Schoeppe been less intelligent than he was, or less able to appeal to the assistance of his fellow professionals, he would undoubtedly have added another name to the list of the victims of what is mistakenly called circumstantial evidence—in reality the admission of mistaken expert opinions as evidence. This result of the final trial, obtained by such unheard of exertions by a class of men second to none in influence, due to character and reputation, made manifest not merely that the chemical investigation of Dr. Aiken was conducted on a mistaken basis and in a faulty manner, but that a system which permitted an opinion, as I may call the *ex parte* investigation, to be offered in evidence, was in itself faulty. Nor is it to be doubted that the Court which, on a verdict rendered on the strength of such testimony, sentenced an innocent man to be hanged, and brought him so near that fate as to be measured for his coffin to the sound of the carpenters building his scaffold, will for the future require strict proof of the facts of every process, and retain for itself and the jury the expression of opinions thereon.

If it should be said that the case of Dr. Schoeppe is an exceptional one, and that such another would not occur again in a century, it should be answered that such startling exceptions show us the necessity of clinging more closely to the rule of evidence, and that some provision should be made whereby, in similar cases, all danger of the expression of such mistaken opinions might be averted. This would seem to be an easy task, and one which could be performed in manner similar and on the same principles which now regulate the prosecution of criminals by the State. Every one knows that a criminal can

obtain not merely a statement of the crime with which he is charged, but a list of the witnesses by whose testimony the charge is to be substantiated, and that all *ex parte* testimony is excluded. What is there to prevent a similar communication to be made whenever a *post mortem* examination is to be or has been made? Why should not the accused be informed of the intentional process, or of the processes already had, so that by employing experts to attend on his own behalf the possibility of error might either be wholly averted or the chances thereof greatly diminished? The State cannot stoop to surprise a criminal, much less an accused citizen, not yet proven, through conviction of guilt, to have forfeited his right to protection. The investigation necessary is to be used, not for the purpose of conviction but for the manifestation of truth. This is the end of all evidence, the object of all legal and proper processes of trial; and surely such an investigation as the chemical analysis of human remains, the contents of the stomach and viscera of a person dying under suspicious circumstances, which can scarcely be repeated, should be so conducted as not to rest for belief in its fairness on the opinion, character, or reputation of witnesses summoned for one side only. How much better that such investigation be made under the jealous scrutiny and criticism of a chemist or analyst employed for the defence, who should thereby prevent anything from being taken for granted, and, *pari passu*, with the process, mark the doubts and demonstrate the facts. It is no more to be supposed that this course would be attended with any more danger to the State than the very common practice of assigning counsel to defend an accused who "has no lawyer;" and it would seem that, on the same principle of securing him a *fair* trial, that he is entitled to this aid to his defence. Is it not evident that if this course had been pursued in the case of Dr. Schoeppe, he would never have been tried at all, and that both the State and the accused would have been spared the immense expense and suffering caused by Dr. Aiken's error of mistaking the product of his own process for the producing cause of death? It would seem, therefore, as if an enlightened economy would dictate the adoption of this course, especially where, in cases of life and death, the humanity of the law compels the production (and explanation) of the best evidence before the jury. Without this provision, as long as such testimony from experts is admitted, the accused, when poor and friendless, is exposed to the danger of having apparent proof exhibited against him, prepared beforehand and testified to by an expert in every way disposed to maintain his own testimony. Trained it may be in a faulty school, the tenets of which he has adopted, his professional pride binds him to make good the apparent results of his theoretical experiments, and, as long as he is enabled to testify to his opinions, he is freed from the necessity of determining any doubts that may have arisen. If an obstinate, conceited, or prejudiced man—all of which are

perfectly compatible with a high popular reputation for skill and character—how will it be possible to permit such an expert to testify to his opinion without incurring the gravest risks?

Again, the idea that opinions should be admitted, because otherwise there would be a failure of all evidence, is wrong, not only because with sufficient care the facts on which opinions are based can be themselves testified to, but also because, when in any case the facts could not be testified to, the opinion would, of necessity, be mere conjecture or inference, and, as has been shown, utterly out of place in the mouth of a witness. If an opinion based on facts, then it is an usurpation of the functions both of Judge and jury; if a conjectural one, based on theory, it is certainly not evidence. The admission of such testimony at all would rather seem to be the result of a belief that trials were instituted for the purpose of conviction. With most people the fact that there is an accusation is proof sufficient of guilt, and they deem it but the duty of the State's attorney to adopt every means of developing a criminal out of the accused. To effect this, in the opinion of such persons, any means not absolutely dishonorable, should be employed. Such, however, is not the spirit of *our* laws and institutions, but is an idea borrowed, with fashions of dress and manner, from the French. With that nation the public prosecutor, and even the Judge before whom the accused is examined, is allowed and praised for practices which, with us, would create a popular uprising. With us, as has been said, the prisoner is assured the benefit of the doubt, the only qualification being that the doubt should be founded in reason. How is it consistent with this principle of our public law to allow the introduction of opinions? If we are told that otherwise professional men would refuse to testify at all if they were compelled to swear absolutely, is not that a confession that there is so much doubt on many points whereon experts are usually called for their opinions, such division among leading authorities, that such testimony ought to be wholly excluded? Until these divisions of the doctors, proverbially so difficult to heal, shall be brought to happy accord by established fact and demonstration, let us bear in mind that provision which declares that a man shall only be deprived of life, liberty, or property by due process of law, and cling the more closely to the strict rule of legal evidence.

It is scarcely necessary to refer to the recent cases of Mrs. Wharton, in Maryland, or that of Heggi, in our own State. The adoption of the provision of conducting the chemical analysis under the eye of a professional analyist as counsel, as has been suggested, for the defence, would have saved Dr. Aiken from being a second time brought to open shame—the prosecution would have discovered the lack of foundation for the accusation, or, it may be, the improbability of obtaining a conviction, and would not have been under the necessity of turning the Court

room into a laboratory in the discharge of its duty. These cases have, however, demonstrated anew the fact that one cannot always rely on experts, as used at present, for thorough impartiality, and that if they are to be permitted to express their opinions as witnesses, it is absolutely necessary that both Judge and jury be thoroughly well read on both sides of the question. When this is the fact, it is evident that the true office of the expert would be destroyed, and that there would be no room for that instruction in the science involved which, it is maintained, is the only good reason for his introduction. Thus far I have confined my citation of illustrations of the uses of expert testimony to those cases which involve points of mechanical, scientific or chemical knowledge and experience, and, however imperfectly or cursorily, have, I trust, said enough to show that in all the material or exact sciences there is no necessity for the admission of opinions as evidence. In the criminal cases to which reference has been made, however exceptional they may have been in their circumstances, enough, too, has been said to justify their exclusion, under the merciful provisions and spirit of our public law.

But leaving all that great variety of cases which derive their complexity and difficulty from the insufficient exploration of the fields of material science, we are brought face to face with those which seem to pass beyond the domain of matter and involve us in the mysteries of the human mind. In these cases, strange to say, the position of the expert is reversed. He is no longer a danger to the accused, threatening life or liberty with the faulty products of ill founded theory, but he is a peril to society itself. Interposing between the guilty and the sword of public justice, he stays the execution of sentence for crime committed, and so, by rendering punishment uncertain, he weakens that sense of accountability which is the security of civilized society. How to exclude his testimony, or so to admit it as to prevent the utterance of mere conjecture as true opinion, and yet not offend the merciful leanings of the law itself, is a problem not yet satisfactorily solved by the courts. How to brace up juries to resist their own tenderheartedness, and apply the test of reason to the doubts he suggests, so as to find their verdicts in accordance with strict law and justice, is a task for the prosecution which he renders more and more difficult.

Both statute law and reason itself decide that no man should be held criminally responsible for acts committed when insane; but it is evidently necessary that this immunity should not deprive the community of the power of protecting itself; that in thus creating a city of refuge, to which all criminals might flee, it should at least have the privilege of criticising their right to admission, and of so guarding its gates as to prevent their return to active mischief. Unfortunately for the community, the subject is itself but imperfectly understood, even by those who claim to have devoted their lives to its investigation. How,

then, can one apply a test, when as yet there has been no unfailing touchstone found? How require proof of facts where everything is guesswork and conjecture? The popular predisposition to believe in pleas of insanity is shown in the saying "That there were more lunatics outside of than in the asylums." Every man can recall to himself some instance of sudden, unexpected mental aberration, often without apparent or sufficient cause. How then can an easy going, it may be sympathetic, jury be compelled to do their duty to society, if an expert can only be found to opine that the accused was, is, or ought to be insane? The law itself, which gives the prisoner the benefit of the doubt, would seem sufficiently lenient, but when there is added thereto the aversion of all men to inflict severe penalties, the fact of punishment inflicted becomes so rare as to be almost phenomenal. Nor is this power of paralyzing the arm of the law confined to capital cases only. Its efficacy has led to its being exploited in so many directions, that already the right to inflict any punishment at all has been denied, on the ground that the commission of crime is in itself evidence of insanity.

The credit perhaps, of first application of this system of philosophy to practice is due to the late James T. Brady, who, reduced to invention for a plea for Huntington, the forger, gravely urged in his behalf the defence of *moral insanity*. Unfortunately for his client the jury remembered that the hearts of *all men* were equally desperately wicked, and that being the normal condition, his client was found guilty of the exceptional enormity of sanity and forgery combined. Despite this unfortunate result the defence has found, as has been hinted, great favor in the eyes of all the defenders of the accused, and they have applied their talents with such unflagging zeal to its elaboration, that at the present day there is no unrestrained act of anger, lust or avarice, which has not been classified and passed upon as a peculiar species of emotional insanity. Fortunately, neither my duty nor inclination compel me to offer what would be necessarily inexpert observations on the nature of the various forms of amentia, dementia or mania. It is enough to comment upon the manner in which it is introduced, the appeal to the sympathies, coupled with the usual disquisitions on the infirmities of human nature. If so fortunate as to have had a known grandfather, the foibles of people long dead and gone are resurrected, with which, and the conduct of the accused, to make up a hypothetical case for the decision of the expert. The kleptomaniac and the murderer both have shared the benefits of the defence, —the one to return to the bosom of his disgusted relatives, the other to become a leader in the land.

In Macfarland's trial we have an illustration of the "hypothetical case" carried to its highest perfection, and of its eminent success in the conduct of a desperate defence—when addressed to experts competent to give an opinion. In the Judge's charge you will find the following: "Experts have been called in this

case. They are to be considered rather as mirrors with which merely to reflect upon you their opinions, but you remain the sole judges whether those reflections are accurate. Sometimes the expert is an enthusiast, sometimes he is a clever charlatan—hence the usefulness of the jury as an umpire." The Recorder nevertheless allowed these experts to hear a narration of the same facts presented to the jury, and declare thereon the opinion that the accused was insane (see Vance and Hammond); whereupon, after a decent hesitation, the jury sheltered themselves behind the opinions of the expert and acquitted the prisoner.

Unfortunately there is no adequate remedy for morbid sensibility, partisanship, or lax regard for the obligations of an oath. For these causes of the failure of justice and defeat of law we must look to the morals of the community; and if we wish to insure fidelity to duty, as prescribed by Phillips to the tenants of the jury box, we must, in some degree at least, reform society. If dereliction from duty was visited with the penalty of social ostracism, the courts would be idle.

In the absence of this restraint we can, however, hope to effect the desired object by removing excuses, behind which the fault when committed can be sheltered. If we remove the temptations of this kind, falsehoods in the verdicts of juries will become less frequent. When, therefore, we shall find Judges on the bench who shall remorselessly exclude all testimony which, under the strict rules of evidence, does not bear upon the main fact, we will find juries much less frequently shutting out, as it were, the facts from their verdicts.

In cases in which insanity is the chief defence, it would seem, at the first glance, harsh to insist upon the strict application of this rule. The disease exists in so many forms—it is so often unsuspected even by those in constant contact with the sufferer, that one may well ask how it is to be detected or proved if not by experts—and how can it be proved by them, if not by admitting their opinions? If it were the fact that it can only be proved in this way, that should be sufficient to exclude this kind of proof from trials at law, as this view substitutes theory for that certainty which is the mainstay of society and law; but as the proper expert duty is to describe and explain symptoms of genuine attacks, so that the jury may form a correct opinion, one can hardly see how the charge of harshness could be justified. It would, of course, be bad for the accused if the facts were not strong enough, but it would not be a reason for complaint on the part of the community.

Why should an expert be allowed to express an opinion as a witness? If he is called as an observer, or living record of the symptoms of others, he is not properly a witness, but an addition to the body of the law on this subject. His office is that

of a commentator, and his utterances should be used like those on any other branch of the law.

The duty of the *witness*, it is to remembered, is to testify to the facts of the particular case. If he is both a witness of the daily condition and acts of the person at the bar, and an expert beside, of course he will be on that account the better able to speak with certainty, leaving to the cross-examination the task of exposing his falsehood or ignorance. If, however, such a witness, so amply fitted by position and skill, should only be willing to testify to his opinion, would one not at once conclude that he doubted the truth of his own observation? Ought it not to be properly excluded, or, if admitted, destroy his evidence? If, then, it would not be proper to admit his testimony in the shape of an opinion that the acts observed were insane, why should an expert be allowed to give an opinion on a hypothetical case, which is propounded to him as a witness? Hypothetical cases presuppose the existence of actual precedents. If, therefore, the expert is the embodiment of a knowledge of these, is it not sufficient that he should narrate his experience, describing cases parallel in character and symptoms with their results?

Doing this he would supply to the Court the lack of what in law we call "reports" on his particular science, and enable it to perform its duty to both the State and the accused. He would, and should, in fact, act not as a *witness* in the case, called by the side which employs and pays him, but as a witness to his science, and not be allowed to act as a willing respondent to the hypothetical cases put to him by a partisan employer. Precedents and descriptions of precedents he might well recite and verify, but their parallelism and relevancy should not be allowed to be shown by him in an opinion, but should be reserved as matter of argument for the advocate and charge by the Judge, to be passed upon by the jury.

If, in addition to his experience, he has a knowledge of the recorded experience of others, he might also identify and authenticate such records, giving, as he may be well fitted to do, the proper share of weight and authority to each.

We must remember that the rules of evidence, which would seem so to limit his scope, have been adopted as the best means of arriving at the truth. Harsh, therefore, as the exclusion of opinions and the limitation of hypothetical cases may be said to be, it is not an exclusion of anything of material importance—at least to the attainment of justice. The innocently accused would not require such aid: nor can history supply us with many—I have not been able to find any—instances in which they have suffered for want of such assistance: while, on the other hand, books both of history and law, from that recording the crucifixion of our Saviour, in whom was *found* no wrong, down to the suicide of Mrs. Waters in England the other day, are full of instances of innocents who have suffered from the admission of opinions to the witness stand. We must not forget

that the utter exclusion of everything like these opinions from testimony as not being lawful evidence, is by no means to deprive either party of its use—it is simply to apply to all experts the rule which, in courts of justice, is applied to the lawyers themselves. These certainly, though experts in their profession, would think it a strange procedure in a trial of a case to manufacture invented and supposititious cases to propound to another lawyer on the witness stand, in the hope and expectation of thereby deriving opinions which should influence the judgment of the court and the verdict of the jury. Doubtless the absurdity of the thing would strike others with equal force; but it does not seem to occur to men in general that the ordinary use of experts amounts to the same thing. In the case of the lawyer, with his hypothetical cases of law, it would imply ignorance of law on the part of the Court. Surely, it implies nothing else in the cases involving scientific inquiry. If, therefore, the implication is a just one (and as mankind has but a short life and art is long, it is no reproach), the proper position of the expert, when admitted at all, is as an instructor in the facts of his science, and the laws relating to the same. The opinion which he is forbidden to deliver is that which the jury is to form, under the direction of the enlightened judge, who sits for the purpose of instructing them in the law, after they have heard the presentation of all sorts of cases, hypothetical and other, in the argument of counsel. The exclusion would, therefore, deprive the parties, plaintiff or defendant, of nothing, but would simply put that part of the performance in the hands of the proper actors. It would, indeed, do more than this; but all that it could do would be in the way of a more certain and speedy administration of public justice. It would remove from the practice of the law certain reproaches which now cling to that honorable profession. It would prevent the office of experts from being invaded by those who have but the slightest claim to the honors of the professions they do so much to bring in doubt, while it would bring into deserved honor and reputation the men of real learning and true merit. As the expert is now used and allowed to testify, it is but seldom that men of real eminence are in demand. The person now desired is that one who has the "greatest facility of communicating" his opinion to the jury, who will so deliver it as to favor the side for which he may be called, and by no means that man whose patient research and laborious study has made him the master of his mystery. The latter would, doubtless, make permanent additions to the law and the sum of human knowledge; but he would be a most unlikely personage to depend on for the suggestion of a useful fiction. The probability of this, and the need of some such shelter for the criminal without just defence, has called the other class of experts into being, and the admission of opinions has furnished the means of operation. An oath, and the penalties for falsehood attached, may prevent the manufacture of facts; but opinion is

intangible. It is subject to no rules—is pronounced, as it were, on honor, and the proof of utter want of foundation affords no ground for a prosecution for perjury. That this means of escape has been used to the utmost; that, thereby, the sword of justice has been blunted and her arm paralyzed, there is no need of the citation of cases to prove to any citizen of New York. We have already alluded to the manner in which it has been used in proving insanity in the defence of criminals of all grades, from that of murder to embezzlement; and we are justified in the assertion that the scope thus given to the use of expert testimony is dangerous to society. Evils of this kind, fortunately, like any other bad laws, work their own cure. From a serious obstacle to the prosecution it is becoming a laughing stock. Juries are being educated up to the point of having opinions of their own, and now and then startle us with verdicts in accordance with the facts. Soon the revulsion will reach that much to be desired point when the opinion out of place will destroy rather than raise the doubt.

If the revulsion would only stop here one might well be satisfied with the effect, without too nice questions of the mode of its production; but, unfortunately, this very mode of cure brings evils in its train almost equal to the original trouble. If juries can be allowed to disregard what is admitted by the Court as evidence, because the popular sentiment is aroused against it, there is an end to all fixed rules and established law. There will be nothing left to curb the course of that popular opinion which is as utterly out of place in the jury box as it has been shown, or at least attempted, it is in the mouth of a witness. The remedy on which I would much rather rely will be found in the return to the more stringent application of the rules of evidence, with penalties for disregarding them, whereby a salutary check can be efficiently put to the progress of this evil.

In the foregoing pages I have endeavored to show that it is in no way necessary, either to the cause of justice or the elimination of truth, that an expert should be allowed to give an opinion upon the witness stand. In so doing I have avoided going into the technicalities of the law of evidence, but have given what I may call popular reasons. As an illustration of the completeness with which an expert will combine in one opinion all the functions of witness, advocate, Judge and jury, permit me to quote rather liberally from one now lying before me. In justice to the eminent author, I wish most distinctly to state that I do so without the slightest idea of imputing any improper motive to him whatsoever. I use it as an illustration, fortunately in print, of the extent to which an expert can go, and the many characters that he feels called upon to assume, not doubting but that the memory of my auditors will recall instances of oral testimony on kindred subjects, which, if not so

full and comprehensive, were of similar character. I find in the preface to this, the second edition, the following: "The finding of the jury was adverse to the contestants; but it will be seen that the Judge sustains all the legal and scientific points upon which I have insisted in my view of the case." While, therefore, the "finding of the jury" will relieve us of any suspicion of criticising it from any connection with a case lost by its means, the fact of its "legal and scientific points" having been sustained by the Judge, shows that as a contribution to law on the subject it was regarded justly as of great weight. That in this light it might be proper, and a grateful amelioration of the labors of the Court, there would be no shadow of doubt, did not the perusal of the whole production prove it to be the issue, not of a calm, impartial instructor, but of an interested and partisan advocate. Admirable and rich as it is in stores of learning on the subject of insanity in general, and monomania in particular, it is more like a brief for an advocate retained to prove one James C. Johnston destitute of testamentary capacity than anything else.

Retaining the form of an opinion, it opens with an introduction of the testator, continues with a sketch of his manner of life, antecedents and surroundings, as viewed from the contestant's point, and then, with the certainty of conviction, pronounces him incapable of making a will because of mental derangement. After this, however, he weakens the force of his own dictum by acknowledging the extreme difficulty of giving such a meaning to the word "insanity" as will "cover all possible cases of deficiency or aberration in the mental faculties, and yet not include those instances of cerebral disease which cannot properly be classed under this head," and filling the next five pages with the citation of varying and clashing authorities. The author, however, passes *them* by, and confines *himself* to the one available form of insanity, which in this case he claims was monomania. This, with the utmost distinctness he declares, was the matter with the testator. Sane on all other points but the one of disliking his own nephew, his dislike for him was proof of a monomania that prevented in law his leaving his property to whom he liked. Eight pages of the opinion are therefore devoted to an essay on the subject of monomania, after which, lest there should linger with the jury some prejudice in favor of granting some rights to a monomaniac, he proceeds to afflict him with paroxysmal mania. As, unfortunately, paroxysms imply cessations or lucid intervals, in one of which a will might be made, it becomes necessary to dispose of this difficulty. "Naturally," he says, "the next point to be considered is the legal relations of monomania and lucid intervals." Naturally, a lawyer would say, this part of the case belongs to the Judge; but the author of the opinion rises to the height of the emergency, and takes the matter into his own hands. To this end he cites numerous reported cases

and decisions, which enable him to pronounce authoritatively that lucid intervals are a delusion and a snare—and, in fact, that there is no such thing. This established, it follows, of course, that the testator could not have had *any*, and, if the logic may be completed, he was at all times crazy, if not always a maniac. After this rather partisan argument he says, "This concludes what I have to say relative to the law and science of monomania, as the same are acted upon and understood in Germany, France, England and the United States at the present day."

"This is *all I have* to say," says this expert, renowned for his knowledge, and with his great reputation, to influence the verdict of a jury. But this is by no means the position which an expert should be allowed to occupy. If it is *all* that *can* be said, there is no fault to be found; but if it is not, then it is at least reprehensible. The very reputation of such an expert for knowledge and skill in observation would add such weight to such a statement as to make an ordinary jury believe that it *was* all—that the "law" of the case had been fully and fairly stated. The obligations of honor are binding upon the expert to do this—for his only right to give an opinion, or to testify at all, is derived from the belief that he is a minister of the truths of science. In any other view the citation of authorities scarce to be comprehended, and hardly to be refuted by lawyers in a court of law, can be only made for the purpose of darkening counsel and confusing the jury. As an opinion by an expert, written with full opportunity for reflection, and therefore much less liable to be swayed and distorted from the most perfect impartiality than when delivered in court during the heat of a contest, it will be useful to consider closely the one now under examination. If it fails in this respect, what may we reasonably expect from the other?

In the first portion of it the author uses the following expression, inadmissible under all the decisions: "I am entirely satisfied, after a full consideration of such evidence, documents and statements as have been submitted for my examination, that the testator was not of sound and disposing mind," etc. The judicial character of this declaration, which, however, legally destroys the opinion, can hardly fail to be noted. The ordinary inference is that the testimony on both sides had been submitted to him; if not, it is not possible to believe in the impartiality, or attach any value whatsoever to the declaration made. Remembering, however, that this declaration is not made by an ordinary witness, but by one lifted above the common herd—by one selected as an expert—does it not show the danger of giving the power of such utterance to those who may be so unmindful of the ordinary obligations of fairness among men?

The author does not, however, through all his long opinion, give us the slightest proof that he has seen the testimony in behalf of the testator's sanity. Everything of that kind de-

pends on unsupported inference; and yet, in the quiet of his study, he deems he has a right to prepare for utterance the most decided declarations. Let me quote from the second part of his opinion: "The testator had been insane for fifteen years prior to the execution of this will, and his sister was similarly affected. His attacks of delirium were paroxysmal in their character, and in the intervals he would be of apparently sound and healthy mind. Over these attacks of delirium he had, as is common in *insanity* of this *form*, a certain amount of control. When persons before whom he wished to appear to advantage would approach him he would suppress his *ravings*, but would again break out in them when left alone, or with those whose presence had become familiar to him. At times, too, after becoming thoroughly *exhausted with his delirium*, he would regain his calmness, beg pardon of those who had been with him, admit the existence of his insanity, and state that he ought to be carried to an asylum."

Now, not to state that, according even to this rather strong statement, the unfortunate Johnston exhibited an unusual power of will and self-knowledge, ought it not to have occurred to the expert that he was himself "piling the agony" upon a monomaniac—possibly from one sided statements by interested persons? The context seeming to bear out the idea that this testmony and evidence was so furnished, ought he not rather to have utterly refused to have given any opinion at all unless furnished with the fullest evidence on both sides? Of this fact the opinion, as it is professedly a judgment on the law and fact on insanity applied to the case in hand, should have contained abundant and convincing proof.

Up to the point which I have now reached in this "opinion" there has been maintained some slight semblance of judicial tone and style—enough to make one suppose it was intended for a one sided charge to the jury. From this point, however, it abandons it entirely, and becomes an open partisan argument. That it is an able one, and perfectly allowable to an advocate avowedly retained by one side, can be admitted, though it may well be doubted whether any Court would permit, or any counsel dare to impute motives and feelings so recklessly and positively on so slender a foundation of proof. Not only is this done on slender proof, but the poor man is accused of sentiments of which there is no proof whatever, and which must have been locked up in his own bosom. That he did not act in accordance with such imputed motives and feelings is adduced as proof of his insanity. It seems that the testator had supported a nephew and his wife for many years, but that an opportunity occurring to break up his establishment, he sent both adrift for reasons expressed in a letter which is cited. This act the "opinion" terms the "consummation of a plan which, with all the cunning of a monomaniac, the

testator had kept long confined in his own bosom." If the line of argument and logic is correct, it will be eminently dangerous for any one to bear patiently with a household grievance until the day of delivery arrives.

After a continued preparation for his final effect, in the same strain, the author introduces the will and the directions to the executors *in extenso*. These he pronounces such as no sane person would write. Odd they are, doubtless, but without disparaging the author's judgment and opportunities for forming a judgment, it may well have occurred to him to reflect that there is no source of litigation so fruitful as the testamentary dispositions of ignorant or ill-tempered decedents. A moment's thought would, perhaps, have shown him that there were two sides to the question so positively decided.

Large as is the space which I have devoted to the criticism of this opinion, I cannot dismiss it without referring to the conclusion which is contained in "seven points." Of these the first four relate to the disease of monomania. The fifth repeats the charge that the testator was a monomaniac, and incapable of making such a will as he would have made if sane. The sixth affirms that "there could not possibly have been a lucid interval when the will was written, signed, acknowledged and reaffirmed, because all these acts show a continuance of the delusions under which the testator labored," and the seventh decides "that therefore he was not possessed of testamentary capacity, and that, consequently, the paper dated the 10th April, 1863, and reaffirmed the 13th of September of the same year, is not his last will and testament."

Annexed to the opinion is the charge of the Judge, which, however, does not verify the statement in the preface that I have quoted, inasmuch as in offering to the jury the usual choice of alternatives, he very far fails from sustaining the expert in the last of his "legal and scientific points." This fact, and the verdict of the jury in opposition to the directions and conclusions of this "opinion," tend to confirm me in my expressed suspicion that there was some testimony or proof on the other side to which the author gave no attention.

While confessing that I am puzzled to assign the particular office which this production was intended to perform, I am by no means in doubt as to the lesson which it serves to enforce. If a gentleman of high standing in the community, of large and extensive practice and great acquired knowledge in his profession, will, in the quiet of his study, prepare such an "opinion" for use in a cause involving the mere right to property in a distant State, what can you reasonably expect of an expert on the stand, where his feelings are enlisted and excited, and the game is one of life and death? How can you expect the impartiality of the pure scientist when the expert is allowed to be summoned as a witness for one side? That he should be allowed to furnish a one sided brief seems equally out of rule.

If I have thus far—in directing your attention to the relaxation

of the rules of evidence in admitting the opinions of experts as testimony, as the cause of evil to society, inasmuch as it introduces an element of uncertainty—seemed to have treated the subject too much from the lawyer's point of view, it is because that point of view ought to embrace all sides. It certainly does not entirely leave out of sight that one which reflects the obligation which the expert owes, not only to society but to those other honorable men, his professional associates, who also devote their lives to the pursuit of scientific truth. As a lawyer, I would exclude his opinions from testimony only to raise them to the dignity of law; I would remove him from the arena of strife as an advocate, and exclude him from the witness stand, that I might raise him to the position of an *amicus curiæ*, owing no allegiance to either party, and only bound to declare the established and demonstrated truths of science for the enlightenment of all. I would elevate the man, and through him the science he professes, by putting him beyond all suspicion of interest, all thought of partisanship, and I well believe the strict application of the rules of evidence would effect this in a great measure by removing temptations which now too strongly appeal to the weaknesses of human nature.

As an authoritative recognition that this is the proper position of the expert, at least on the question of insanity, recur for a moment to the statutory provisions of our State thereon, and see if there is any reason, in principle, why this defence, when pleaded, should not be passed upon by the Court, aided by experts summoned by itself, *before* as well as after the verdict of the jury. In itself a statutory defence, its regulation by other statutory provisions could scarcely be obvious to the constitutional inhibition. A trial so regulated would be as much due process of law as any other, and the jury would receive the law of the case on this subject, as well as on the public law, from an enlightened Court, instead of being, as now, compelled to reconcile the opinions of diverging, because partisan, expert witnesses. Let me recall to your memory the recent case of George Francis Train as an illustration. His verdict of acquittal having been rendered on the ground of insanity, and the Court having been certified by the jury, *or otherwise* (for so says the statute as it stands), of that fact, the Court was bound to carefully inquire and ascertain whether his insanity in any degree continued. The Court did so inquire and ascertain, by means, we must suppose, of impartial experts, and did further, as the statute provides, order him into safe custody. Whether he went to the asylum, and if not, why not, Mr. Bell can give us full information. The point is, that in cases of the successful use of this plea, the Court now has a right to retry the accused with the proper assistance of experts, and that on their decision, as the law now stands, depends the liberty of the citizen. As the statute seems to take from the petty jury the right of deciding upon the present insanity of the prisoner, then and there under their

personal observation, it becomes matter of wonder that they should be allowed to pass upon that question at all. If they *cannot* tell whether he *is insane now*, how can they tell that he *was* at the time of the commission of the act charged as a crime? The plea being a confession and avoidance, it would seem eminently proper that the avoidance, when statutory and depending for recognition on scientific knowledge and skill, should be passed upon in the first instance by the same court which, as we have seen, has the power of passing upon it in the second.

If it is objected that in practice the criminal is not bound to declare his special defence until the last moment, the objection can be obviated by compelling him to put in his special and especially statutory defences before trial, and as a correlative duty oblige the State to call the necessary adjuncts to the ordinary Judge to fit him to pass upon this plea. It must be remembered that in theory the plea is always supposed to be interposed in good faith. There cannot, therefore, be any reasonable objection to a course which would speedily verify and sustain it.

Even now the statute book shows a further approach to a recognition of the propriety of this course, for it is provided that if any person in confinement, *under indictment* or sentence, or under any than civil process, "*shall appear to be insane*," the first Judge of the county, or his substitute, as therein mentioned, "shall institute a careful investigation, call two respectable physicians and other credible witnesses, invite the district attorney to aid in the examination, and, if he deem it necessary, call a jury," with power to compel their attendance; and if the insanity is satisfactorily proven, the prisoner shall be discharged from prison and be removed to the asylum, where he shall be retained until restored to his right mind, when, if the Judge shall have so directed, the convalescent shall be returned to prison to be tried, serve out his sentence or be discharged. In all these cases the provision of the statute applies to insanity proved at the time, evident at the time of the act, or developed in confinement; but there is no apparent reason why the same provision should not be made to apply to the trial in chief before the ordinary petty jury. As far as it concerns the accused it would seem to be preferable to the present course, though it may be that justice and truth are not always what he desires. At all events, it would be equitable to him and practically beneficial to society, while to the expert—really deserving of the name in restoring him to his true position of scientific interpreter—it would be a rescue from past reproach and constant suspicion.

A popular idea concerning trials at law is that they are all, civil and criminal, simply trials of skill between trained tricksters; that the merits of a cause have much less to do with the decision than the skill of the attorney in preparing his side of the case for presentation to and the power of the advocate in

enforcing it upon the jury; that in such cases, as in love and war, all tricks are allowable, and, when they assure success, laudable. As experience has afforded many seeming instances of proof, and as success uniformly brings large profit to the successful practitioner, it is not strange that all expedients conducive to that end have been adopted. This—of the use of expert testimony—has been by no means the least popular. But while I recognize the strong inducements on the part of the ambitious and unscrupulous lawyer for its use, I confess that it strikes me with no little astonishment that members of equally learned, if less ambitious professions, should so readily yield themselves to his service. Nor is my surprise diminished by the knowledge that while nearly every learned profession in the land has at least some sort of organization, no one of them has taken any public step to check the extravagance of those professional experts who play the charlatan in the courts. It is an act which they owe to their own dignity and self-respect, and which cannot be long delayed without the diminution of both the loss of popular esteem and veneration. This, as I have tried to show, the courts may assist them in doing, by excluding opinions and confining these representatives of the learned professions to their demonstrated facts and discoveries; but the organized bodies of these professions can do more, by making the law of professional honor bear with greater stringency against those who offend against its tenets. When the two shall work together and attain this end, law and justice will be much more closely approached, and the popular regard for them greatly enhanced.

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